Per Curiam

SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, WARDEN *v.*
RUSSELL COLEMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–437. Decided December 14, 1998

PER CURIAM.

After a jury trial in a state court in California, respondent Russell Coleman was convicted of the September 5, 1979, rape, sodomy, and murder of Shirley Hill. The jury's two special circumstances findings of rape and sodomy made Coleman death-penalty eligible under California law. See *People* v. *Coleman*, 46 Cal. 3d 749, 756–757, 759 P. 2d 1260, 1264 (1988).

At the penalty phase of Coleman's trial, the trial judge gave the jury a so-called Briggs instruction, then required by California law, which informed the jury of the Governor's power to commute a sentence of life without possibility of parole to some lesser sentence that might include the possibility of parole. After giving the standard Briggs instruction, the state trial court instructed the jury that it was not to consider the Governor's commutation power in reaching its verdict. Thus, the full jury instruction on commutation was as follows:

> "You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> "Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.

"So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.

"You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole.

"I instruct you again that you are to consider only those aggravating and mitigating factors which I have already read to you in determining which punishment shall be imposed on this defendant." Respondent's Opposition to Motion to Amend Petition for Writ of Habeas Corpus in No. C89–1906 (ND Cal.), p. 7, Record, Doc. No. 267, quoting Tr. 1059–1060.

In an unrelated case, we had upheld the Briggs instruction against a federal constitutional challenge. *California* v. *Ramos*, 463 U. S. 992 (1983). On direct appeal, however, Coleman argued that giving the Briggs instruction in his case was reversible error under the California Supreme Court's decision in *California* v. *Ramos*, 37 Cal. 3d 136, 689 P. 2d 430 (1984). There the California Supreme Court held, on remand from this Court, that the Briggs instruction violates the California Constitution because, in the California Supreme Court's view, it is misleading, invites the jury to consider irrelevant and speculative matters, and diverts the jury from its proper function.

The California Supreme Court rejected Coleman's argument and upheld his death sentence. *People* v. *Coleman*, *supra*. While the court found that the giving of the Briggs instruction was error under California law, it held the error was not prejudicial because the additional instruction told the jury it should not consider the possibility

of commutation in determining Coleman's sentence. *Id.*, at 104.

Coleman then sought a federal writ of habeas corpus. Although the District Court acknowledged this Court's holding that giving the Briggs instruction does not violate the Federal Constitution and does not mislead or inappropriately divert the jury, the court nonetheless granted the writ as to Coleman's death sentence. No. C89–1906 (ND Cal., Mar. 28, 1997), App. to Pet. for Cert. A–146, A–151. Relying on recent Ninth Circuit precedent, the District Court found the Briggs instruction was inaccurate as applied to Coleman because it did not mention a limitation on the Governor's power to commute Coleman's sentence. *Id.*, at A–147. Under the California Constitution, the Governor may not commute the sentence of a prisoner who, like Coleman, is a twice-convicted felon without the approval of four judges of the California Supreme Court. Cal. Const., Art. 5, § 8.

The District Court found that, because the Briggs instruction did not mention this limitation on the Governor's commutation power, it violated the Eighth and Fourteenth Amendments by "g[iving] the jury inaccurate information and potentially divert[ing] its attention from the mitigation evidence presented." No. C89–1906, *supra*, at A–151. The court also found that, in the context of the case—particularly, the prosecutor's arguments of future dangerousness, "the commutation instruction would likely have prevented the jury from giving due effect to Coleman's mitigating evidence." *Id.*, at A–149. The court did not in express terms consider the effect of the additional instruction, which instructed the jury not to consider commutation, but it noted that the Ninth Circuit had held in a similar case, *Hamilton* v. *Vasquez*, 17 F. 3d 1149 (1994), "that the trial court did not cure the error by instructing the jury not to consider commutation." No. C89–1906, *supra*, at A–148.

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The Court of Appeals for the Ninth Circuit affirmed the District Court's grant of the writ as to Coleman's sentence. 150 F. 3d 1105 (1998). The Court of Appeals agreed with the District Court's finding that the instruction, as applied to Coleman, gave the jury inaccurate information about the Governor's commutation power. *Id.*, at 1118. And, in a sweeping pronouncement, the court declared, "[a] commutation instruction is unconstitutional when it is inaccurate." *Ibid.* The instruction at issue was fatally flawed, the court held, because it "dramatically overstate[d] the possibility of commuting the life sentence of a person such as Coleman" (by creating "the false impression that the Governor, acting alone," could commute the sentence) and thus prevented the jurors from "understand[ing] the choice they [we]re asked to make" and "'invited [them] to speculate' that Coleman could be effectively isolated from the community only through a sentence of death." *Id.*, at 1119.

Having concluded that the giving of the instruction was constitutional error, the Court of Appeals then took up the State's argument that, even if the instruction was unconstitutional, it "did not have a 'substantial and injurious effect or influence' on the jury's sentence of death," *ibid.*, as required by *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993). The court explained:

> "To decide this question, we look to *Boyde v. California*, 494 U. S. 370 (1990). When the inaccuracy undermines the jury's understanding of sentencing options, 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U. S. at 380.
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> "We conclude the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction." 150 F. 3d, at 1119 (parallel citations and other citations omitted).

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Though the Court of Appeals' constitutional analysis of the jury instruction, and the Circuit precedent on which it relied, have not been approved by this Court, we do not consider the validity of that analysis here because the State has not asked us to do so. We will simply assume at this stage that the instruction did not meet constitutional standards. The State does contend, however, that the Court of Appeals erred by failing to apply the harmless-error analysis of *Brecht*. We agree.

We held in *Brecht* that a federal court may grant habeas relief based on trial error only when that error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U. S., at 637 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). This standard reflects the "presumption of finality and legality" that attaches to a conviction at the conclusion of direct review. 507 U. S., at 633. It protects the State's sovereign interest in punishing offenders and its "good-faith attempts to honor constitutional rights," *id.*, at 635, while ensuring that the extraordinary remedy of habeas corpus is available to those "'whom society has grievously wronged,'" *id.*, at 634 (quoting *Fay* v. *Noia*, 372 U. S. 391, 440–441 (1963)).

A federal court upsets this careful balance when it sets aside a state-court conviction or sentence without first determining that the error had a substantial and injurious effect on the jury's verdict. The social costs of retrial or resentencing are significant, and the attendant difficulties are acute in cases such as this one, where the original sentencing hearing took place in November 1981, some 17 years ago. No. C89–1906, *supra*, at A–101, n. 45. The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually

prejudiced by the error. *Brecht*, *supra*, at 637. As a consequence, once the Court of Appeals determined that the giving of the Briggs instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by *Brecht*.

The *Boyde* test that the Court of Appeals applied instead is not a harmless-error test at all. It is, rather, the test for determining, in the first instance, whether constitutional error occurred when the jury was given an ambiguous instruction that it might have interpreted to prevent consideration of constitutionally relevant evidence. *Boyde* v. *California*, 494 U. S. 370, 377, 380 (1990). In such cases, constitutional error exists only if "there is a reasonable likelihood" that the jury so interpreted the instruction.

Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U. S., at 380, it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the error on the jury's verdict; it merely asks whether constitutional error has occurred. If the Court of Appeals had viewed the jury instruction as ambiguous on the issue whether the Governor had the power alone to commute defendant's sentence, it might have inquired—as in *Boyde*—whether there was a reasonable likelihood that the jury understood the instruction as stating the Governor had that power. If the court found that possibility to be a reasonable one, it would determine then whether the instruction, so understood, was unconstitutional as applied to the defendant. Even if the court found a constitutional violation, however, it could not grant the writ without further inquiry. As the Court has recognized on numerous occasions, some constitutional errors do not entitle the defendant to relief, particularly

habeas relief. See, *e.g.*, *Brecht*, *supra*, at 637–638; *O'Neal* v. *McAninch*, 513 U. S. 432, 435–436 (1995) (applying harmless-error review to an instruction that "violated the Federal Constitution by misleading the jury"). The court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict.

The motion of respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, and the judgment of the Ninth Circuit Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.